No. 11532.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THEODORE S. GAGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

JOSEPH J. CUMMINS,
739 South Hope Street, Los Angeles 14,
Attorney for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX

PAGE

Jurisdiction 2

Statement of the case 2

Specification of errors 11

Argument 12

I.

The trial court abused its discretion in denying appellant's motion for a new trial based upon newly discovered evidence 12

A. Evidence that appellant was engaged in an investigation to expose and entrap Tomsone, the Government's chief witness 12

Portions of transcription of conversations between Joseph J. Cummins and Dr. M. J. Hurst 13

Portions of transcription of conversation between Joseph J. Cummins and Dr. David Levine 14

Portions of transcription of conversation between Joseph J. Cummins and Dr. Charles Strachan 16

Portions of transcription of conversation between Joseph J. Cummins and Dr. Theodore Kane 17

Portions of transcription of conversation between Joseph J. Cummins and Dr. Colonel Strayder 18

Conversation of January 2, 1947 21

Conversation of January 6, 1947 22

B. The records of two convictions for theft of the Government's chief witness, Hubert Tomsone, and his service of two sentences therefor 34

II.

The trial court erred in striking the testimony of Fred Skill and in preventing him from completing his testimony 35

III.

The evidence is insufficient to sustain the verdict and judgment 38

Conclusion 38

TABLE OF AUTHORITIES CITED

Cases

	PAGE
Craft v. Barron, 121 Ky. 129, 88 S. W. 1099	37
Kennedy v. Modern Woodmen, 243 Ill. 560, 90 N. E. 1084	36
Martin v. United States, 17 F. (2d) 973	25, 26
Morss v. Palmer, 15 Pa. 51	37
People v. Skaggs, 80 A. C. A. 93	23, 33
Pettine v. Territory of New Mexico, 201 Fed. 489	25, 32
State v. Albanes, 109 Me. 199, 83 Atl. 548	37
United States v. Boyer, 85 Fed. 425	25
United States v. Henry, 52 Fed. Supp. 161	25
United States v. Miller, 61 Fed. Supp. 919	25, 26, 34
Williams v. United States, 3 F. (2d) 129	35

Statutes

United States Code, Title 18, Sec. 207	1
United States Code, Title 28, Sec. 225	2

Textbooks

Wigmore on Evidence (1940), Sec. 923, p. 450	36
Wigmore on Evidence, Sec. 1618	36

No. 11532.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THEODORE S. GAGE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

To the Honorable The Ninth Circuit Court of Appeals of the United States:

This is an appeal by appellant, Dr. Theodore S. Gage, an orthopedic physician and surgeon, from a conviction under the Federal bribery statute (18 U. S. C., Sec. 207), the pertinent provisions of which read as follows:

> "Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity under or by virtue of the authority of any department or office of the Government thereof * * * shall ask, accept, or receive any money * * * with intent to have his decision or action on any question, action, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, influenced thereby, shall be * * * guilty of a crime."

The conviction is based upon an indictment in two counts. In substance, count one charges appellant with asking for, and count two charges appellant with accepting or receiving a bribe from the Government's chief witness, Hubert Tomsone, while appellant was employed as an orthopedic physician and surgeon in the Out-Patient Department of the United States Veterans' Administration, West Los Angeles, California (sometimes hereinafter referred to as "Veterans' Administration"), with intent to have his, appellant's, decision and action on matters which may by law be brought before him in his official capacity, namely, matters of prescribing orthopedic shoes and devices at said Veterans' Administration, influenced thereby.

Appellant was convicted on both counts of said indictment and sentenced to imprisonment for a term of one year on Count One and for a term of one day on Count Two, said sentences to commence and run concurrently, and was in addition fined $1.00 on each of said counts.

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 225, U. S. Code.

Statement of the Case.

Appellant Dr. Gage is an M. D., specializing as an orthopedic physician and surgeon, having been engaged in the practice of medicine for nearly twenty years with an unblemished record.

The Government's chief witness, Hubert Tomsone, upon whose contradicted testimony of conversations had solely between himself and appellant this entire conviction rests, was and is a manufacturer of orthopedic shoes and

devices under an exclusive written contract with said Veterans' Administration.

Appellant was honorably discharged from the Armed Forces of the United States in Southern California in the spring of 1946 [Tr. p. 202], after four years of service at home and overseas in the medical corps assigned to orthopedic surgery [Tr. p. 201]. He hoped to remain in Southern California and applied for a position at said Veterans' Administration in August, 1946, while preparing himself for admission before the State Board of Medical Examiners for the State of California with the intention that upon such admission he would enter private practice [Tr. p. 204]. The uncontradicted testimony shows that appellant was employed by the Veterans' Administration as an orthopedic physician and surgeon, in which field he had specialized, about August 5, 1946 [Tr. p. 204] upon the understanding with Dr. Long, Chief of the Out-Patient Department thereof, that he, appellant, was accepting the same as an interim position until he passed said California State Board examination [Tr. p. 204].

The contention of the prosecution, based solely upon the testimony of the aforesaid Hubert Tomsone, was that on or about September 11, 1946, the second time appellant ever saw said Tomsone, appellant commenced to solicit Tomsone for a bribe upon the promise that appellant would, by virtue of his authority to prescribe orthopedic shoes and devices, increase the sale thereof, and that thereafter, on or about October 18, 1946, appellant accepted such a bribe from Tomsone in the sum of $100.00, being, according to Tomsone, the first payment of a $100.00 per week agreement therefor.

Appellant's defense throughout the trial was, and still is, that Tomsone attempted to bribe him, that he was conducting an investigation of Tomsone, and that he took said $100 from Tomsone as part of his said scheme to entrap him.

It was and is admitted that on or about October 18, 1946, appellant took $100 from Tomsone in the parking lot of the said Veterans' Administration; that immediately thereafter appellant went directly to his office and was there apprehended by agents of the Federal Bureau of Investigation, and that the said money was then in his possession. The only testimony of the agents of the Federal Bureau of Investigation was as to these physical facts. However, the uncontradicted testimony established the fact that after he received the money from Tomsone appellant was only in his office a couple of minutes before said Federal Bureau of Investigation agents entered and arrested him [Tr. p. 257]. Appellant testified, consistent with his defense, to the effect that he was making an investigation and trying to entrap Tomsone; that he intended to "go to Dr. Long (the chief of the Out-Patient Department) and put it on his desk and say, 'Now hear the whole story'" [Tr. p. 257], but was prevented from carrying this out because he was arrested so quickly [Tr. p. 260]. This is completely consistent with the appellant's defense, and intent of appellant to have his official actions influenced by the receipt of said money certainly cannot be derived from this testimony of the Federal Bureau of Investigation agents as to said physical circumstances.

The only testimony in the entire record inconsistent with appellant's aforesaid defense is the testimony of Tomsone

himself that (1), appellant rather than Tomsone was the solicitor of the bribe, and (2), that appellant had the intent to have his decision and action on matters which may by law be brought before him in his official capacity, influenced thereby. This testimony is contained solely in Tomsone's version of conversations had between appellant and himself at which, according to Tomsone, no other persons were present. There is no corroboration of Tomsone's testimony as to the content of these conversations. This entire conviction, therefore, rests upon that testimony of Tomsone's.

Appellant categorically denied he solicited Tomsone for a bribe [Tr. pp. 237, 238, 240, 251, 252, 257 and 258], testified throughout the trial that Tomsone attempted to bribe him [Tr. pp. 245, 246], and that he accepted the sum of $100.00 from Tomsone as part of his investigation and plan on entrapping him.

Each and all of the statements of Tomsone contained in his testimony of said conversations bearing on the question of appellant's solicitation or intent were categorically denied by appellant [Tr. pp. 237, 238, 240, 251, 252, 257, 258]. As heretofore stated, appellant also testified that Tomsone attempted to bribe him [Tr. pp. 245, 246].

Three witnesses testified that the reputation of said Hubert Tomsone in the community for truth, honesty and integrity was very bad and that they would not believe him under oath [Tr. pp. 298, 302 and 309].

Two character witnesses were called on behalf of Tomsone. The first, John Harder, testified that he based his testimony as to Tomsone's reputation upon the opinion

of only one person, one Walter Bitner [Tr. pp. 330, 331], with whom Tomsone had only occasional business contact [Tr. p. 331]. The second character witness for Tomsone also admitted, under cross-examination, that his testimony regarding Tomsone's reputation was based upon the statement of only one person, one Alfred Russo [Tr. pp. 336, 337].

Three witnesses testified that appellant's reputation in the community for truth, honesty and integrity was very good [Tr. pp. 196, 197, 198, 199]. This testimony is uncontradicted.

According to Tomsone's own testimony, when appellant entered upon his duties as an orthopedic physician and surgeon at said Veterans' Administration in the early part of August, 1946, Tomsone was away on a vacation [Tr. pp. 137, 138], and admittedly did not return to the City of Los Angeles and/or did not meet appellant until the Friday after Labor Day, which was September 6, 1946 [Tr. pp. 137, 138], which was one month after appellant became connected with said Veterans' Administration.

The uncontradicted testimony shows that prior to Tomsone's return from his vacation appellant had discovered that Tomsone's work was defective and slovenly and not in accordance with the specifications of his contract [Tr. p. 235], and that there were numerous complaints of Tomsone's delivered products from veterans by virtue of improper fits and modifications [Tr. p. 232]; that appellant had informed Tomsone at their first meeting of the aforesaid facts [Tr. p. 232], which later complaint resulted in an open brawl between the appellant and the said Government's chief witness, which brawl is admitted

by Tomsone himself [Tr. p. 138]; that appellant made universal complaints to virtually everyone in authority and more particularly to his associates that the shoes which Tomsone was deliverng to the Veterans' Administration were of poor quality and that Tomsone was making improper charges to the Government, which testimony of said complaints is corroborated by the testimony of doctors at said Veterans' Administration [Tr. pp. 286, 289], and by Gordon L. Howe, Supply Officer at said Veterans' Administration and a Government witness [Tr. pp. 94, 95]; that appellant was asked by said Gordon L. Howe to rewrite said Tomsone contract [Tr. pp. 263, 237], and that appellant informed Tomsone that he was asked to rewrite the contract [Tr. p. 237].

The Government's chief witness Hubert Tomsone, testifying as to various of the conversations between himself and appellant, stated that appellant commenced his solicitation for a bribe on the 10th of September, 1946, the second time he had ever seen appellant and slightly more than one month after appellant became connected with the Veterans' Administration [Tr. p. 139]. It is significant to note that this was only four days after the bitter argument between them at their first meeting, which argument was expressly admitted by Tomsone himself as heretofore mentioned [Tr. p. 138].

It is further significant to here note that the testimony unequivocally supported by the Government's own witnesses established: (1) that when appellant was employed by the said Veterans' Administration he was the only doctor in the Orthopedic Department, but that after he had worked there alone for some time appellant asked for and was assigned two other doctors in his department

to assist him, each of whom had the same authority as appellant to independently examine and prescribe shoes and orthopedic devices under said Tomsone contract, and (2) that thereafter appellant, in sheer disgust with the quality and nature of Tomsone's shoes and orthopedic devices, intended to resign and did prepare a written resignation from said Veterans' Administration on or about October 2, 1946.

Dr. Frank L. Long, Chief Medical Officer of the Medical Department and Chief of the Out-Patient Department of said Veterans' Administration [Tr. p. 108], a Government witness, unequivocally corroborated appellant's testimony that appellant asked him to assign and that he, Dr. Long, assigned two other doctors to help appellant in his department [Tr. p. 121] and that each of said doctors had the same authority as appellant to independently examine and to determine and prescribe orthopedic shoes and devices [Tr. p. 122]. A further uncontradicted fact is, and this is corroborated by the testimony of Arthur J. Nie, Medical Administrative Officer of the Medical Division of the Los Angeles Veterans' Administration Regional Office [Tr. p. 321], and by the written request for resignation of appellant signed by Arthur J. Nie under date of October 2, 1946 [Deft. Ex. A in evidence; Tr. pp. 321, 322], that appellant decided to resign from the Veterans' Administration and that on or about October 2, 1946 he prepared a written resignation from his position at said hospital, which he was influenced to withhold by his superiors [Tr. p. 315]. Appellant testified he had decided to resign in sheer exasperation because of the low quality of Tomsone's shoes and devices and their nonconformance with the specifications of the exclusive con-

tract which Tomsone had with said Veterans' Administration [Tr. pp. 246, 247].

The significance of said facts is that they expose Tomsone's version of the conversations had between him and appellant as completely inconceivable and inherently improbable. It is inconceivable and inherently improbable that appellant would take the risk of commencing the solicitation of a bribe from a complete stranger whom he had met just once before upon an occasion which terminated in a bitter argument. Further, if Tomsone's testimony that appellant sought and accepted a bribe from him upon the promise that he would increase the sale of Tomsone's shoes by virtue of his authority to prescribe the same is true, why would appellant ask for and accept additional doctors in his department with the same independent authority to prescribe such shoes and thus render himself incapable of performing the very promise which, according to Tomsone's testimony, was the basis of the alleged bribe? Finally, how could appellant have the intent to accept a weekly bribe from Tomsone in return for prescribing additional shoes and at the same time have the intent to resign from the Veterans' Administration?

The only testimony, therefore, in the entire record of this case, to the effect that appellant intended to have his official conduct influenced rests upon the sole word of the Government's chief witness, Tomsone, a man whose reputation for truth, honesty and integrity was severely attacked at the trial and who had a clear motive for getting appellant out of the way, and whose inherently improbable testimony of said conversations at which only he and appellant were present is sharply contradicted

by appellant's testimony thereof and the uncontradictable evidence hereinabove and hereinafter referred to. In view of the foregoing, the evidence in this case can not and does not support the verdict and judgment.

But this appeal does not alone rest upon the legal insufficiency of the evidence that was in possession of the jury. Most important of all is the newly discovered evidence obtained by appellant's new counsel after the trial, to the effect that during the period of his entire connection with said Veterans' Administration, *i. e.,* during the period that Tomsone testified he was engaged in bribery activities, appellant was engaged in an investigation of the orthopedic setup of the Veterans' Administration and of Hubert Tomsone, the Government's chief witness, and that during said time appellant had on numerous occasions stated to certain of his colleagues and superiors that he felt Tomsone was "paying somebody off," and that he was trying to get him and that he was undertaking an investigation and finding out certain things and that as a consequence there would probably be "some fireworks" or "fur flying" [Tr. pp. 19-60].

This evidence, which was never before the jury, thoroughly undermines the already insufficient and sole foundation of this conviction, Tomsone's testimony as to those private conversations, and completely establishes the lack of the crucial element of intent. Said evidence was concealed and suppressed at the time of trial for one reason or another, and was only obtained by appellant's new

counsel by virtue of telephone conversations recorded on a sound transcriber attached to said counsel's telephone under conditions where the witnesses were unaware of the same. Said evidence was presented to the trial court upon motion for a new trial, which was denied.

In addition to the foregoing newly discovered evidence, and also subsequent to the trial of this case, appellant's new attorney discovered the record of two convictions of theft of the Government's chief witness, Hubert Tomsone, for which said Tomsone served two sentences in the Long Beach City jail. This was also submitted to the trial court upon the motion for a new trial, which motion was denied.

Specification of Errors.

1. The trial court abused its discretion in denying appellant's motion for a new trial based upon newly discovered evidence [Tr. pp. 14; 15-18].

   (a) Evidence that appellant was engaged in an investigation to expose and entrap Tomsone, the Government's chief witness [Tr. pp. 19-60].

   (b) The records of two convictions of theft of the Government's chief witness, Hubert Tomsone, and his service of two sentences therefor [Tr. p. 18].

2. The trial court erred in excluding the testimony of Fred Skill and preventing him from completing his testimony [Tr. pp. 18; 295-299].

3. The evidence does not support the verdict and judgment.

ARGUMENT.

I.

The Trial Court Abused Its Discretion in Denying Appellant's Motion for a New Trial Based Upon Newly Discovered Evidence.

A. Evidence That Appellant Was Engaged in an Investigation to Expose and Entrap Tomsone, the Government's Chief Witness.

Subsequent to the trial, appellant's new attorney, Joseph J. Cummins, by means of telephone conversations recorded on a sound transcriber attached to said attorney's telephone elicited admissions from various witnesses which testimony was withheld and suppressed by said witnesses at the time of the trial and did obtain testimony from two witnesses who were not present at the trial. Because of the suppression of this evidence at the time of trial the same was not presented to the jury and was only obtained subsequent thereto by appellant's new attorney under said circumstances whereby said witnesses were unaware of the fact that their testimony was being recorded.

This newly discovered evidence consists of statements made to defendant's new counsel, Joseph J. Cummins, by disinterested professional men employed at said Veterans' Administration, namely, Drs. M. J. Hurst, David Levine, Charles Strachan, Theodore Kane and Colonel Strayder.

The entire telephone conversations of these men with said Joseph J. Cummins, as recorded by a recording machine attached to the telephone of said Joseph J. Cummins at the time of said conversations, and submitted to the trial court upon a motion for a new trial, are set forth on pages 19-60 of the Transcript.

These conversations establish that during the period of his connection with said Veterans' Administration, *i. e.*, during the period he is accused of engaging in bribery activities, appellant had on numerous occasions stated to certain of his colleagues and superiors that he felt Tomsone was "paying somebody off" and that he was trying to get him, and that he was undertaking an investigation and finding out certain things and that as a consequence there would probably be some "fireworks" or "fur flying." The pertinent portions of these conversations are here set forth:

Portions of Transcription of Conversations Between Joseph J. Cummins and Dr. M. J. Hurst.

"Hello.

JJC. Dr. Hurst?

Dr. H. Yes.

JJC. My name is Joseph Cummins. I'm Dr. Gage's new attorney. I wanted to ask you a question, because on this question might be predicated our ability to get him a new trial. Did you ever hear in any of the bull sessions or discussions around there, did you ever hear Dr. Gage say that he was making an investigation, and that there might be 'fur flying' or 'hell popping,' or words to that effect?

Dr. H. Yes sir, I heard some—

JJC. Mow many times have you heard him say that?

Dr. H. Well I'd say at least two times, maybe three.

JJC. Can you recall, doctor, who all was present when he made those statements? Was Dr. Kuhn there?

Dr. H. I think he was, I know—

JJC. Was Dr. Levine there?

Dr. H. I think he was. I know it happened—once when I was—when just the two of us were alone.

JJC. Uh-huh. Did he ever tell you that he was trying to get Tomsone; that he felt that Tomsone was paying somebody off and he was trying to get him?

Dr. H. Yes, uh huh." [Tr. p. 54.]

Portions of Transcription of Conversation Between Joseph J. Cummins and Dr. David Levine.

"JJC. Did he ever complain to you how bad Tomsone's shoes were?

Dr. L. Oh yes, yes he mentioned that not only in my presence but that and several others at the same time.

JJC. He did.

Dr. L. Oh, yes.

JJC. On more than one occasion?

Dr. L. On several occasions.

JJC. Uh huh. And did he say what he was going to do about it?

Dr. L. Yes, he mentioned the fact that—that there was something . . . there was something fishy in Denmark—if I may use that term—

JJC. Well, sure.

Dr. L. And that he was finding out certain things that were going on, and . . . although he didn't expand upon that—

JJC. Uh huh.

Dr. L. And that as a consequence there would probably be some fire works. That's about the way he put it. [38]

JJC. He said there was going to be some 'fire works'?

Dr. L. Very likely he said there would be.

JJC. Uh huh.

Dr. L. And then he told me on one occasion that he had sent a letter to Washington.

JJC. Uh huh.

Dr. L. And, subsequently he told me that he had been called into the chief medical officer's office and had been informed that the chief medical officer there had received a reply to that letter but would not divulge it to him.

JJC. Uh huh.

Dr. L. The letter, in other words, went through indirect channels. He claims that he never saw that letter. That he never personally received a reply to it from Washington which was—made him rather indignant. He felt that this was a personal matter and he told them that he had not gone through channels.

JJC. Uh huh.

Dr. L. And that therefore the letter had been properly sent through the channels. That is the reply had been properly sent through channels. But he said the contents of the letter were not divulged to him. He was told to . . . more or less . . . keep out of things that didn't concern him . . . Something along that line.

JJC. You are referring to Dr. Long.

Dr. L. That's right.

JJC. Uh huh.

Dr. L. This is indirect—this is what Gage told us.

JJC. Yes, naturally. 'He told us.' You mean there were others of you doctors present?

Dr. L. Well, I don't know whether at the same time or individually, [39] but Dr. Kane, Dr.

Strachan, Dr. Kuhn were those to whom he talked mostly."

[Tr. pp. 33-35.]

* * * * * * * *

"Dr. L. Oh, he told me—well he mentioned even before that—as I recall it—that he had apparently hit upon something . . . and that he was going to follow it through."

[Tr. p. 37.]

Portions of Transcription of Conversation Between Joseph J. Cummins and Dr. Charles Strachan.

"Dr. S. Hello.

JJC. Hello, this is Joseph Cummins. Remember I called you last week at home regarding Dr. Gage.

Dr. S. Yes.

JJC. I just want to ask you another question that didn't come up at that time, doctor. Talking to Dr. Levine and Dr. Hurst they told me something that sounded insignificant to them but it might be an important item, and that's this: That during their bull sessions around the hospital Dr. Gage made the statement on more than one occasion that he is working on something and that one of these days hell will be popping or there'll be fur flying, or words to that effect. Did you hear such a statement?

Dr. S. Well I don't remember anything specific.

JJC. Not specific, but something that sounded like that.

Dr. S. Oh, yes, sort of intimated something like that.

JJC. Uh huh. That—you don't remember the exact words—that's what you mean.

Dr. S. No I don't remember any exact words.

JJC. No. But the idea, you do recall him having made such a statement?

Dr. S. Yes."

[Tr. pp. 52-53.]

Portions of Transcription of Conversation Between Joseph J. Cummins and Dr. Theodore Kane.

"Dr. K. I don't recall it as such. I know that he was trying to—how should I word it—he was complaining about the quality of the work, and he was checking on that. That was most of the gist of his conversation. You know that letter that he wrote."

[Tr. p. 58.]

* * * * * * * *

"Dr. K. Then I remember when he came back and said there had been an answer to that letter and he wasn't told what it was—something like that—I mean the stuff that you already know.

JJC. Uh huh. [61]

Dr. K. My impression was that he was waiting for that letter and there would be some hell to pay in regard to the contracts, etc. Something he was trying to find out about those—"

[Tr. p. 60.]

* * * * * * * *

"Dr. K. Yeh. He was always complaining about the quality of his work.

JJC. Uh huh. And were any of the other doctors there?

Dr. K. If I'm not mistaken there would be half a dozen of us in the room. He'd come in and say, 'Well, gee whiskers, I had a case yesterday or this morning, or something, and that was sure a lousey job. He sure does this and he sure does that.' I mean it was just general conversation."

[Tr. p. 26.]

Portions of Transcription of Conversation Between Joseph J. Cummins and Dr. Colonel Strayder.

"Dr. S. Well, right after I started to work down there I went off on leave. While I was working down there I didn't know just what was going on. He said the contract for the shoes was not good. He was trying to get the contract broken. He wanted the Government to buy shoes from anybody that would make them."
[Tr. p. 48.]

* * * * * * * *

"JJC. Did he complain to you about the type of shoes that Tomsone was delivering to the hospital?

Dr. S. Yes, that was common talk . . . Everybody knew *that.*

JJC. Did he express himself that he thought perhaps Tomsone was sticking there because he was paying somebody off?

Dr. S. Well, he didn't know.

JJC. He told me he told *you* that prior to his arrest.

Dr. S. He might have mentioned it to me.

JJC. Do you remember him saying that to you?

Dr. S. Well, I couldn't say. Really, I wouldn't know for sure whether he did say that.

JJC. He told you that he was working—making an investigation—or words to that effect.

Dr. S. He talked about it all the time. Whether he had that in mind or not I couldn't be able to say for sure."
[Tr. p. 49.]

* * * * * * * *

"JJC. What was the worst he said about Tomsone and his shoes?

Dr. S. They were lousy shoes, or words to that effect . . .

JJC. He tells me that he told you that the only way a man could put shoes like that into the the hospital is that he was paying somebody off. Do you remember him saying that to you?

Dr. S. He might have, but if he did, of course, that would be merely a supposition.

(Inaudible conversation.)

JJC. How many times did he make such complaints to you?

Dr. S. Oh, I wouldn't know. Probably one or two times, when he'd bring a shoe over there for me to look at . . . he turned them down . . . I wouldn't know. The veteran wouldn't like the shoe and he would bring it back in. He'd send them back and have them fixed over.

JJC. And during that conversation he might have said to you that the only way a man could bring a shoe like this into the Administration would be that he's paying somebody off, or something like that?

Dr. S. I don't recall that. I don't recall him ever saying that. I wouldn't know.

JJC. He might have said it?

Dr. S. He might have said it in just ordinary conversation . . . He was driving at an investigation—to find out what, I didn't know . . . We couldn't do anything about it. All we could do was holler about it. We all did that. He didn't let the contract. He didn't have anything to say about it." [Tr. pp. 50-51.]

* * * * * * * *

"JJC. Well, you say he complained about Tomsone's work. The work was bad and that—did he say, 'He'd like to have a change—would like to have somebody else do it, or this, or that'?

Dr. S. Oh, yes, things similar to that. Yes, that's true."

[Tr. p. 27.]

A reading of the complete transcriptions of these conversations, Transcript pages 19-60, strikingly reveals the reluctance, hesitancy and avoidance of these witnesses toward disclosure of any nature, and particularly of the pertinent matters of this case, even under conditions where they did not know that their conversations were being recorded. The extent of their withholding and suppression of this vital evidence at the time of trial, when they would have to testify in the open and were subjected to various fears and pressures, is well illustrated by the transcription of the telephone conversations between said Joseph J. Cummins and Dr. Ralph H. Kuhn. During the above quoted recorded conversations several of the doctors stated that said Dr. Kuhn was present at the times appellant made the aforesaid vital statements. Dr. Levine stated that said Dr. Kuhn was one of the men to whom appellant talked mostly. [Tr. p. 35.] Dr. Hurst stated that Dr. Kuhn was present when appellant stated that he was "making an investigation and that there might be fur flying and hell popping." [Tr. p. 54.] Yet even at the time of said recorded telephone conversations Dr. Kuhn was afraid to, and refused to talk. Because the recorded conversation with Dr. Kuhn even at this post trial period so vividly reproduces the attitude at the time of trial of the other persons, it is here set forth:

Conversation of January 2, 1947.

"JJC. My name is Joseph Cummins. I'm an attorney. I've just been substituted in in the Dr. Gage case.

Dr. K. Yes.

JJC. Are you in a position to speak more or less freely right now . . . I want to ask you a couple of questions.

Dr. K: Well—

JJC. Or would you rather I spoke to you at home?

Dr. K. What's that?

JJC. Would you rather I spoke to you at home?

Dr. K. Well, I'm not at home very much.

JJC. Well, I'll ask you—Frankly, I'm trying to get Dr. Gage a new trial . . . and . . . I spoke to some of the other men in your department and asked them a couple of questions very frankly, and they're on these lines: 'Did you ever hear Dr. Gage make the statement that he's making an investigation and that there'll be "fur flying" or there'll be "fireworks" or "hell will be popping," or words to that effect?'

Dr. K. Well, I tell you, Mr. Cummins, I don't know that I want to go into this thing. There are a lot of complicating factors entering into it, and I might be willing to talk to you some time but not now and not over the 'phone.

JJC. All right. Any way you say, Doctor. Would you be kind enough . . . I gave you my home 'phone number, to call me at your convenience?

Dr. K. All right, just one second . . . Now, what's the 'phone number?

JJC. My office number is TRinity 0431.

Dr. K. Just one second . . . TRinity [47]

JJC. 0431.

Dr. K. 0431.

JJC. My residence is BRadshaw 24552.

Dr. K. 245—

JJC. 52.

Dr. K. 24552. I'll call you.

JJC. And I'll appreciate it.

Dr. K. Thank you.

JJC. Thank you, sir." (Tr. pp. 45-46)

Conversation of January 6, 1947.

"JJC. Dr. Kuhn, this is Mr. Cummins.

Dr. K. Oh, yes . . . yes. Uh-huh.

JJC. This is January 6th, and my affidavits to Judge Hall have to be in on the 8th.

Dr. K. Yah, well, now, I'll tell you, Mr. Cummins. I've talked this situation over with some of my people who are rather influential here in the city, and I believe I'd rather keep out of it.

JJC. Oh, it's not a question, Doctor, of keeping out of it. I don't want to drag you into anything. I merely want to ask you one question . . .

Dr. K. Well, I . . .

JJC. And that is this. If you don't want to answer it, it's all right. 'Did you ever hear—'

Dr. K. Mr. Cummins, I don't care to get into it, and I agreed to call you, but then, talking things over . . . people advise me not to become involved. You see, I've been in court on this case and I feel that I don't care to go again.

JJC. Well, 'Did you ever hear Dr. Gage—' [48]

Dr. K. Well, I'll talk to you some other time, Mr. Cummins. Some time possibly when I'm free and you're free.

JJC. Well, I'll have to subpoena you, Doctor, and take your deposition.

Dr. K. O.K. Goodbye.

JJC. Thank you, sir." (Tr. pp. 46-47)

The testimony of Doctors ~~Hunt~~ Hurst, Levine, Strachan, Kane and Strayder clearly establishes the basis of appellant's defense—that he had no intent to accept a bribe from Tomsone for the purpose of having his official conduct influenced thereby.

In the case of *People v. Skaggs,* 80 Adv. Cal. App. 93, a strikingly similar situation was presented. Because of the apt language of that court in stressing the vital nature of evidence similar to that here considered, we wish to quote the following therefrom:

> "It is next contended by appellant that there is ample evidenec to show that he feigned complicity in a bribe agreement, accepted the $500 and permitted Petillo to believe that he intended to use the money to protect him from the impending prosecution for his alleged assault upon the marines, all for the sole purpose of securing evidence upon which to prosecute Petillo for offering and giving a bribe (Pen. Code, §67). The record reflects that such was the whole defense theory at the trial, and as stated by respondent, 'If appellant was pretending to accept a bribe then he is of course not guilty.' It is unnecessary to here set forth the evidence offered in support of this theory, as we have hereinbefore narrated it in detail. Suffice it to now state that it was established at the trial that prior to keeping his appointment with Petillo to receive the money, ap-

pellant informed no less than three other police officers that he thought Petillo 'was giving me a play for a pay off.' That appellant said to Sergeant Brunty, 'I am supposed to see him tonight. I think he is going to try to give me some money and will you go down and help me on the case?' Officer Brunty agreed if the night lieutenant at University Station approved. Both Officer Brunty and appellant sought out night Lieutenant Bowers and appel-pellant asked his superior officer to send Brunty with him but the lieutenant stated that they 'were awful short tonight for men' and told appellant to 'go down there first and see what it is all about and then if you need help I will get you some help. If you take anybody with you that he doesn't know and if there is a deal on or setup why, he will be scared off.' *This and other testimony hereinbefore set forth and fully corroborated by Lieutenant Bowers, Sergeant Brunty and Officer Goodman is certainly at variance with the propensities and conduct of an officer who was wilfully and unlawfully about to accept a bribe. Bribe takers are not prone to ask for witnesses to their perfidy.*" (Italics ours.)

Said court then states:

"Appellant's defense was a vital issue in the case." (*Ibid.*, p. 108.)

Likewise in the case at bar appellant's defense was a vital issue. If he pretended to take a bribe, then he is, of course, not guilty. The testimony of Doctors Hurst, Levine, Strachan, Kane and Strayden, which was suppressed at the time of trial and obtained for the first time after trial, is certainly at variance with the propensities and conduct of a person who was wilfully and unlawfully about to accept a bribe.

The newly discovered evidence in the case at bar establishing that appellant disclosed to numerous persons that he was engaged in a plan to entrap Tomsone, completely destroys the testimony of the secret conversations between himself and appellant which is the sole foundation of this conviction.

The intent of appellant at the time of the receipt of the money is the crucial element of the offense of bribery under the statute here involved.

United States v. Henry, 52 Fed. Supp. 161;
United States v. Boyer, 85 Fed. 425.

The denial of appellant's motion for a new trial upon the ground of the aforesaid newly discovered evidence under the circumstances of this case was an abuse of the trial court's discretion.

Martin v. United States, 17 F. (2d) 973;
Pettine v. Terr. of N. Mexico, 201 Fed. 489;
United States v. Miller, 61 Fed. Supp. 919.

The suppression of the above vital evidence during the trial and its discovery after trial makes the following language of the court in *Martin v. United States, supra,* at page 796 peculiarly applicable:

> "In our opinion it is the duty of the trial court to grant a new trial where a witness at the original trial subsequently admits on oath that he committed perjury *or even that he was mistaken in his testimony,* provided that such testimony related to a material issue and was not cumulative." (*Martin v. United States,* 17 F. (2d) 973.) (Italics ours.)

In *United States v. Miller, supra,* at page 924, the court in approving and applying *Martin v. United States, supra,* states:

> "What the Court said in Martin v. United States, (5 Cir., 1927), 17 F. (2d) 973, 976, to some extent applies here:
>
> "In our opinion it is the duty of the trial court to grant a new trial where a witness at the original trial subsequently admits on oath that he committed perjury or even that he was mistaken in his testimony, provided that such testimony related to a natural issue and was not cumulative. * * * There is no way for a court to determine that the perjured testimony did not have controlling weight with the jury, and, notwithstanding the perjured testimony was contradicted at the trial, a new light is thrown on it by the admission that it was false; so that, on a new trial there would be a strong circumstance in favor of the losing party that did not exist, and therefore could not have been shown, at the time of the original trial."

A jury is supposed to hear the truth and the *whole* truth. They were not afforded this opportunity when the newly discovered evidence herein considered was suppressed at the time of trial. This suppression of that vital and material evidence deprived the jury of hearing the *whole* truth and is equivalent to falsification. At the very least, it constitutes that type of mistake within the rule of *Martin v. United States, supra,* and *United States v. Miller, supra.*

The penalty this appellant was adjudged to suffer was heavy; the issue here presented is grave. The issue is whether or not appellant possessed the necessary intent

which is the gravamen of the crime of bribery charged. The answer to that question hinged on the truth of the testimony of two men as to conversations had solely between themselves, appellant and the Government's chief witness, Hubert Tomsone. As Tomsone testified that no one but himself and appellant were present when these conversations were had, the only way appellant could refute that testimony at the trial was by his own denial, which he specifically and categorically did. [Tr. pp. 237, 238, 240, 251, 252, 257, 258.]

As pointed out in the Statement of the Case, the difference in the established character of these two men is striking. Appellant, Dr. Gage, is an orthopedic physician and surgeon, having been engaged in the practice of medicine for nearly twenty years, and was honorably discharged from the armed forces of the United States after four years of service at home and overseas in the medical corps, assigned to orthopedic surgery. [Tr. p. 201.] His reputation for truth, honesty and integrity was testified to be very good by three witnesses at the trial. [Tr. pp. 196, 197, 198, 199.] His professional reputation as a very capable and sincere orthopedic surgeon was and is very high amongst those with whom he had professional contact.

Dr. Charles E. Strachan, one of the doctors who worked with the appellant in the Orthopedic Department, testified at the trial:

> "Q. And from your observation of his examinations and diagnosis of the condition of patients there, did you have occasion to observe his conclusions and recommendations with respect to patients? A. Yes, sir, I did.

Q. And from your observation in that respect, Doctor, do you have an opinion as to whether or not his diagnosis and recommendation in so far as the patients were concerned was honest and sincere? A. I believe so, yes." (Tr. p. 283)

Dr. Theodore Kane, in one of the transcribed telephone conversations with Joseph J. Cummins, heretofore referred to, stated:

"Dr. K. He practiced good orthopaedics. We really felt that he was a competent orthopaedic man —so that if any problems that come up from an orthopaedist's viewpoint (not readable) sort of overlooked the little points of technicalities, whether the man was entitled to it or not. If we said, 'We have a case here Gage and we'd like you to do something' he'd go ahead and do it. He didn't ask if he was eligible for it or not." (Tr. p. 24)

In a similar transcribed telephone conversation with Joseph J. Cummins, Dr. Charles E. Strachan stated:

"Dr. S. He treated me fine. I have no complaints against him at all and I think he was trying to do a job out there.

JJC. He is a damned good orthopaedist, isn't he?

Dr. S. Yes, he is pretty good." (Tr. p. 30)

There is not a scintilla of evidence in the record challenging appellant's high professional reputation and ability as an orthopedic physician and surgeon.

Contrasted with this is the testimony of three witnesses at the trial that Tomsone's reputation for truth, honesty and integrity was very bad, and that they would not believe Tomsone under oath. [Tr. pp. 298, 302, 309.]

The two character witnesses called on behalf of said Tomsone testified that his reputation was good. Each admitted that that testimony was based upon the statement of only one person. [Tr. pp. 331, 336, 337.]

As further pointed out in the Statement of the Case, Tomsone's testimony as to said conversations between himself and appellant is inherently improbable and is inconsistent with admitted conduct of the appellant. Although the testimony of Tomsone as to alleged statements of criminal intent made by appellant in said conversations is sharply in conflict, the following significant evidence stands completely uncontradicted:

(1) When appellant first applied for his position at said Veterans' Administration, he was preparing himself for admission before the State Board of Medical Examiners for the State of California, and he accepted the position at the Veterans' Administration only as an interim position until he passed said examination, at which time he intended to go into private practice, which understanding was had with Dr. Long (chief of the out-patient department at Sawtelle.) [Tr. p. 204.]

(2) According to Tomsone's own testimony, when appellant entered upon his duties at the Veterans' Administration in the early part of August, 1946, Tomsone was away on a vacation [Tr. pp. 137-138], and admittedly did not return to the city of Los Angeles and/or did not meet appellant until the Friday after Labor Day, which was September 6th, 1946 [Tr. p. 137-38], one month after appellant became connected with said Veterans' Administration.

Prior to Tomsone's return from his vacation, appellant had discovered that Tomsone's work was defective was

not in accordance with the contract specifications [Tr. p. 235] and that there were numerous complaints of Tomsone's delivered products by veterans by virtue of improper fits and modifications [Tr. p. 232]. Appellant had informed Tomson of the aforesaid facts at their first meeting, to-wit, on September 6th, 1947, which latter complaint resulted in an open brawl between the appellant and said Tomsone, which brawl is admitted by Tomsone himself. [Tr. p. 138.] Yet the testimony of said Tomsone himself is that appellant commenced his solicitation for a bribe on the 10th of September, 1946, the second time he had ever seen appellant [Tr. p. 139], and only four days after the bitter argument between them on their first meeting, which was expressly admitted by Tomsone. [Tr. p. 138.]

(3) When appellant was employed by said Veterans' Administration, he was the only doctor in the orthopedic department. However, after he had worked there alone for some time, he asked for and was assigned two other doctors in his department to assist him, each of whom had the same authority as appellant to independently examine and prescribe shoes and orthopaedic devices under said Tomsone contract. Dr. Frank L. Long, Chief Medical Officer of the Medical Department, and Chief of the Out-Patient Department of the hospital [Tr. p. 108], a Government witness, unequivocally corroborated this testimony [Tr. p. 121].

(4) Prior to October 2, 1946, appellant in sheer disgust with the quality and nature of Tomsone's shoes and orthopaedic devices intended to resign, and that on or about October 2, 1946, he did prepare a written resignation, signed by Arthur J. Nie, Medical Administrative

Officer of the Medical Division of the Los Angeles Veterans' Administration, Regional Office, which document is in evidence as Defendant's Exhibit A [Tr. pp. 321-322]. The testimony of appellant's intention to resign was further corroborated by said Arthur J. Nie [Tr. p. 321].

It is submitted that the fact of appellant's acceptance of his position at the Veterans' Administration as an interim position is inconsistent with the idea of engaging in a course of conduct to obtain a bribe which would rest upon a continuous increase in the sale of Tomsone's shoes. It is inconceivable and inherently improbable that appellant would take the risk of commencing the solicitation of a bribe from a complete stranger whom he had met just once before upon an occasion which terminated in a bitter argument. Further, if Tomsone's testimony to the effect that appellant sought and accepted a bribe from him upon the promise that he would increase the sale of Tomsone's shoes by virtue of his authority to prescribe the same is true, why would appellant ask for and accept additional doctors in his department with the same independent authority to prescribe such shoes since this would render him incapable of performing the very promise which, according to Tomsone's testimony, was the basis of the alleged bribe. Finally, how could appellant have the intent to accept a weekly bribe from Tomsone in return for prescribing additional orthopedic shoes and devices and at the same time have the intent to resign from the Veterans' Administration?

The only testimony of the FBI agents was as to physical facts, admitted by appellant, to-wit, that he took $100 from Tomsone in the parking lot of the Veterans' Ad-

ministration at Sawtelle, and that immediately thereafter he went directly to his office and was there apprehended by agents of the FBI, at which time the money was in his possession. However, the uncontradicted testimony established the fact that after the appellant received the money from Tomsone the appellant was in his office only a couple of minutes before said FBI agents entered and arrested him [Tr. p. 257]. As to this, appellant testified, consistent with his defense, that he was investigating and trying to entrap Tomsone, that he intended to go to Dr. Long (the chief of the department) and tell him the entire story [Tr. p. 257], but that he was prevented from doing this because of his arrest immediately after entering his office. Had said FBI agents waited a reasonable time, appellant's intent might have been clearly established and there might never have been a trial in this case.

The language of *Pettine v. Terr. of New Mexico, supra,* is peculiarly applicable to the case at bar. In that case appellant Pettine was charged with murder in the first degree. His defense was justifiable homicide by virtue of self-defense. The trial resulted in a conviction of murder in the second degree after verdict by jury. One Campagnoli, a government witness, testified that before the killing appellant was in his shop and told him he was going to kill the deceased Berardinelli. After the trial appellant moved for a new trial on the ground of newly discovered evidence, to-wit, that Campagnoli had admitted the falsity of his testimony at the trial, and that appellant had not made such a statement to him. The motion was denied and an appeal taken. The court, on pages 492-493 of the opinion stated:

> "The main issue at the close of the trial of this case was whether the killing of Berardinelli was mur-

der or justifiable homicide. The answer to that question hinged on the truth of Pettine's testimony. * * * The fact that the jury failed to find that Pettine was guilty of murder in the first degree, as charged, is a demonstration that the issue on the truth of his testimony was a doubtful one. He was entitled to an acquittal unless the evidence proved him guilty of some degree of murder beyond a reasonable doubt. Who can say that this testimony of Campagnoli directly impeaching Pettine and contradicting his testimony on the great issue of the trial, his personal intention, was not the very evidence which removed the reasonable doubt that at the second encounter he was the assailed and was not the assailant was true, and prevented his acquittal. The legal presumption is that the false testimony was prejudicial, and it is far from clear beyond reasonable doubt that it was not crucial evidence without which Pettine's evidence would have been believed, the killing would have been found to be justifiable homicide, and he would have been acquitted."

Similar evidence to that obtained after trial in the case at bar and submitted to the trial court upon the motion for a new trial, constrained the Court in *People v. Skaggs, supra*, at page 108, to say:

"Appellant's defense was a vital issue in the case. The proven unmoral reputation of Petillo, his animosity toward police officers, the long and honorable record of appellant as a police officer and his conduct prior to his acceptance of the money, all impress us with the necessity for scrutinizing the instructions given to the jury to ascertain whether those now challenged by appellant operated to prejudice his substantial rights and militated against his receiving

> that fair and impartial trial guaranteed by law to every person accused of crime."

In the case at bar this evidence was not even in the possession of the jury. Who can say that said evidence, directly contradictng Tomsone's testimony and making it completely unacceptable, was not the very evidence which would have shifted the delicate balance of reasonable doubt to the favor of appellant.

> "Trials are conducted, under the direction of the Court, in a search for the truth. A motion for a new trial, which is peculiarly addressed to the discretion of the court, should be granted, where it appears that such an important fact as was here involved was not known to the jury."
>
> *United States v. Miller,* 61 Fed. Supp. 919, 925.

It is respectfully submitted that the denial of a new trial by the trial court under the circumstances of the case at bar was an abuse of the trial court's discretion. Unless all the aforesaid vital and crucial evidence is placed before the jury so that they may have the truth, and the *whole* truth, substantial injustice will result in this case.

B. The Records of Two Convictions for Theft of the Government's Chief Witness, Hubert Tomsone, and His Service of Two Sentences Therefor.

Subsequent to the trial herein, appellant's new counsel also discovered the records of two convictions for theft of the Government's chief witness, Hubert Tomsone, and his service of two sentences therefor in the Long Beach City Jail [Tr. p. 18].

This evidence was also submitted to the trial court on the motion for a new trial, which was denied. In view of the fact that the entire case depended on the conflictng testimony of appellant and said Tomsone, this evidence was vital. Its importance is enhanced when considered in connection with the newly discovered evidence considered in Part A hereof.

The record of such convictions is admissible evidence.

Williams v. United States, 3 F. (2d) 129.

II.

The Trial Court Erred in Striking the Testimony of Fred Skill and in Preventing Him From Completing His Testimony.

Fred Skill testified that he knew Hubert Tomsone, the Government's chief witness, was acquainted with his reputation for truth, honesty and integrity, and on the basis of such reputation would not believe Tomsone under oath [Tr. pp. 297-298].

Fred Skill further testified that when he met Tomsone he liked him and had him in his house and treated him as his son "until he proved what a rat he was." Skill further testified that he had him arrested and as a result of said arrest Tomsone served twenty days in jail. This witness commenced to testify as to said arrest to the effect that he had caught Tomsone in the commission of a crime [Tr. pp. 298-299], when the Court interrupted him and upon *the Court's own motion* ordered his entire

testimony stricken and instructed the jury to disregard it on the ground that it was too remote [Tr. p. 299].

It has been repeatedly held that because character is a more or less permanent quality, inferences from it forward or backward in point of time may be made.

Professor Wigmore, in his work on Evidence (1940, Sec. 923, p. 450), states:

> "* * * while character for truth only was taken as the fundamental requirement, the estimate was allowed to be based on the witness' knowledge of the other's *general* character (emphasis added); so that the inquiry in form became a compromise * * *, *i. e.*, 'Knowing his general character, would you believe him on oath?' In England, then, and in those States which allow that form of question [including federal jurisdictions], a slight concession is made * * * by allowing the witness, in giving his personal opinion as to veracity, to consider *in his own mind* the other's general qualities." (Emphasis the author's.)
>
> "Because character is a more or less permanent quality we may make inferences from it either forward or backward in point of time."
>
> *Wigmore on Evidence,* sec. 1618.

The following cases recognize this accepted principle:

> *Kennedy v. Modern Woodmen,* 243 Ill. 560, 90 N. E. 1084 (Character ten years before the trial in another town, admitted);

Craft v. Barron, 121 Ky. 129, 88 S. W. 1099 (Character in Kentucky ten years before, and in California at the time of trial, admitted in the court's discretion);

State v. Albanes, 109 Me. 199, 83 Atl. 548 (Accused's character in town of residence for the ten years preceding the homicide, admitted);

Morss v. Palmer, 15 Pa. St. 51, 56 (Character more than ten years before in another county, admitted in rebuttal).

Cases to this effect can be multiplied at great length.

Certainly, there is no question that the current character of Tomsone is admissible to show present reputation, and the Court rightly admitted the testimony of the two veterans to the effect that they would not believe Tomsone on oath. Thus, the testimony of Fred Skill, which was excluded, taken together with the testimony of the two war veterans whose testimony was admitted, is conclusive that the witness, Hubert Tomsone, hadn't changed his character in the past twelve years, *i. e.,* that he still could not be believed on oath; and thus it was prejudicial error for the Court to have granted the motion to strike the testimony of Skill. And since Tomsone was the chief government witness, without whose testimony the defendant could not have been convicted, the jury were entitled to have before them the character and reputation for truth and veracity of the government's chief witness twelve years ago, as well as at the time of trial.

III.

The Evidence Is Insufficient to Sustain the Verdict and Judgment.

The evidence in the case at bar has already been reviewed and analyzed in the Statement of the Case and in Part I of the Argument in this brief, and it would serve no useful purpose to burden the Court with a repetition thereof at this point.

Appellant respectfully submits that the evidence as actually submitted to the jury, even disregarding the newly discovered evidence which the jury had no opportunity to hear, was insufficient to sustain the verdict and judgment.

The only direct evidence in the case that appellant had the necessary intent rests upon the word of Hubert Tomsone. The proven bad reputation of Tomsone and the inherent improbability of his testimony as to said conversations has heretofore been considered in an earlier portion of this brief. Because of this, there actually is no evidence in the case of intent upon which the verdict and judgment can be sustained.

Conclusion.

By virtue of the foregoing, it is respectfully submitted that the judgment in the within case be reversed and that the same be remanded for a new trial.

Respectfully submitted,

JOSEPH J. CUMMINS,
Attorney for Appellant.